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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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MAR 16 1993

In the Matters of )  
 )  
Rulemaking to Amend Part 1 and )  
Part 21 of the Commission's Rules )  
to Redesignate the 27.5-29.5 GHz )  
Frequency Band and to Establish )  
Rules and Policies for Local )  
Multipoint Distribution Service; )  
 )  
Applications for Waiver of the )  
Commission's Common Carrier Point- )  
to-Point Microwave Radio Service )  
Rules; )  
 )  
Suite 12 Group Petition for )  
Pioneer's Preference; )  
 )  
University of Texas - Pan )  
American Petition for )  
Reconsideration of Pioneer's )  
Preference Request Denial )

CC Docket No. 92.297

RM-7872; RM-7722

PP-22

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

COMMENTS

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## TABLE OF CONTENTS

SUMMARY . . . . .	i
I. INTRODUCTION . . . . .	2
II. THE GOAL OF INCREASING MINORITY OWNERSHIP. . . . .	3
A. The Stated Problem. . . . .	3
B. The Link Between Minority Ownership and Programming. . . . .	5
C. The Preferences Have Not Worked . . . . .	6
III. A Set Aside of LMDS Spectrum Will Achieve the Diversity Goal. . . . .	7
A. The Commission has the Authority to Set Aside . .	7
B. A Set Aside for Minority Licensees is Justified .	9
C. There are Sufficient Competing Technologies and Available Spectrum to Justify a Set Aside . .	9
D. The Supreme Court has Determined that FCC Policies Encouraging Minority Ownership Do Not Violate the Equal Protection Clause of the Constitution .	11
IV. The LMDS Rulemaking is the vehicle for the FCC to Set Aside a Block of LMDS Frequencies to Foster Ethnic and Cultural Diversity with Appropriate Guidelines to Protect Against Abuses . . . . .	14
V. CONCLUSION . . . . .	15

### Summary

On January 8, 1993, the Federal Communications Commission ("FCC" or "Commission") released its Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration, 8 FCC Rcd \_\_\_\_ (1993) ("NPRM"), proposing to redesignate the use of the 28 GHz band from point-to-point microwave common carrier service to a local multipoint distribution service ("LMDS"). Specifically, the Commission seeks input on how the LMDS allocation should be structured, and how it can best meet its statutory mandate to ensure that any system of random selection "used for granting licenses or construction permits for any media of mass communications" gives significant preferences to ... members of a minority. XYZ urges the Commission to seize this opportunity to more appropriately fulfill its statutory mandate to significantly increase minority ownership in mass media.

In 1978, the Commission released its Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C. 2d 979, (1978) ("1978 Policy Statement"). In that Statement, the Commission noted that although minorities comprised approximately 20% of the U.S. population, less than one percent of the 8,500 commercial radio and television stations then operating were minority controlled. To foster minority participation in ownership of mass media facilities, the Commission determined to award a "minority preference" to minority owned or controlled applicants who pledged to be integrated into the management of the proposed station. The Commission presumed that a minority station owner would be more responsive to the needs of its minority audience, in essence that there is a link between ownership of stations by

members of minority groups and the stations' programming practices. The Commission's prediction, indeed, was valid. In Metro Broadcasting, Inc. v. F.C.C., 110 S.Ct. 2997 (1990), the Court found "a host of empirical evidence" supporting the judgment that there is, in fact, a link between the ownership of stations by members of minority groups and the stations' responsiveness to minority issues.

The minority population in the United States has remained relatively constant since the 1978 Policy Statement, at 20%. In 1978, one percent of broadcast stations was minority controlled. Although AM/FM/TV station totals have risen to 12,851, a fifty percent increase, only 2.8% of all mass media facilities are minority controlled, according to the latest statistics. This abysmal increase in minority ownership has occurred despite fifteen years of implementation of the Commission's policies encouraging minority ownership of mass media facilities. This result demonstrates that the Commission's minority preferences, like its earlier attempts to increase diversity, have failed. There must be a better way.

The Commission has proposed to license LMDS systems in two blocks of 1000 MHz each. The Commission has the authority to set aside frequency blocks for distinctly qualified applicants if it can justify such an action. Clearly, a set aside of one block of LMDS frequencies per service area is justified to increase diversity in the marketplace, given the recognition of the worthiness of this goal by all three branches of the federal government.

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To: The Commission

COMMENTS

The National Association for the Advancement of Colored People ("NAACP") hereby submits the following Comments in the Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration, 8 FCC Rcd \_\_\_\_ (1993) ("NPRM").

On January 8, 1993, the Federal Communications Commission ("FCC" or "Commission") released its NPRM, in which it invited comments on its proposed regulations governing the use of the 28 GHz band, redesignating its use from point-to-point microwave common carrier service to a local multipoint distribution service ("LMDS"). By the same document the Commission addressed two other separate, but related matters, the pending waiver applications

filed in anticipation of the Commission's action in this rulemaking and its decisions regarding two requests for pioneer's preference. In response to the NPRM, the NAACP submits its comments:

**I. INTRODUCTION.**

1. The NPRM was initiated in response to a petition filed by Suite 12 Group ("Suite 12"), a group of inventors who have engineered a millimeter wave component technology which can be used to offer video and other communications services in the 27.5-29.5 GHz frequency range ("28 GHz band"). The NPRM requested comments on several issues related to the proposed licensing and regulation of LMDS. Of specific import to these Comments, the Commission seeks input on how the LMDS allocation should be structured, and how its statutory mandate to ensure that any system of random selection "used for granting licenses or construction permits for any media of mass communications" gives significant preferences to ... members of a minority can best be met. See NPRM at 14. These Comments will urge the Commission to seize this opportunity to more appropriately fulfill its statutory mandate and realize a goal it set forth fifteen years ago: significantly increasing minority ownership in mass media.

2. In the NPRM, the Commission proposed that the 28 GHz band initially be licensed in two blocks of 1000 megahertz each to two different carriers, the 27.5-28.5 GHz band the A-band, the 28.5-29.5 GHz band the B-band. See NPRM at 8. In the NPRM, the Commission also discussed alternative assignment schemes which would allocate smaller blocks of spectrum to different licensees

either in equal or unequal blocks. In any event, it is clear that the Commission intends to license LMDS facilities to multiple licensees in each market. These comments recommend that at least one block of spectrum allocated for LMDS services be set aside for minority applicants.

## II. THE GOAL OF INCREASING MINORITY OWNERSHIP

### A. The Stated Problem.

3. Initially, the Commission did not consider minority status as a factor in mass media licensing decisions, maintaining as a matter of Commission policy that no preference to minority ownership was warranted where the record in a particular case did not give assurances that the owner's race likely would affect the content of the station's broadcast service to the public. See Mid-Florida Television Corp., 33 FCC 2d 1, 17-19 (Rev Bd), review denied, 37 FCC 2d 559 (1972), rev'd TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973).

4. In 1978, the Commission released its Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C. 2d 979, 42 Rad. Reg. 2d (P&F) 1689 (1978) ("1978 Policy Statement"). In that Statement, the Commission noted that although minorities comprised approximately 20% of the U.S. population, less than one percent of the 8,500 commercial radio and television stations then operating were minority controlled. In the 1978 Policy Statement, the Commission concluded:

We are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-

minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment. 68 FCC 2d at 980-981.

The Commission determined that this scarcity of minority controlled stations led to a deficiency in programming responsive to the needs of the various minority communities throughout the United States. The 1978 Policy Statement was based upon an April 1977, conference on minority ownership policies. At that conference, testimony demonstrated that minority preferences were justified as a means of increasing diversity of broadcast viewpoint. See FCC Minority Ownership Task Force, Report on Minority Ownership in Broadcasting I (1978) ("Task Force Report"). The Commission then considered the results of the conference, the recommendations of the Task Force Report, the decisions of the Court of Appeals for the District of Columbia Circuit, and a petition proposing several minority ownership policies filed with the Commission earlier that year, and in the face of an acute underrepresentation of minorities among the owners of broadcast facilities, as reflected in the Task Force Report, it issued its 1978 Policy Statement, setting forth its minority ownership incentives.

5. In the 1978 Policy Statement, the Commission reasoned that because, in mass media, the licensee ultimately is responsible for identifying and serving the needs and interests of its audience, fostering minority participation in ownership of mass media facilities would increase diversity in programming. To foster minority participation in ownership of mass media facilities, it determined to award a "minority preference" to



minority owned or controlled applicants who pledged to be integrated into the management of the proposed station. The Commission, by the 1978 Policy Statement, "endorse[d] its commitment to increasing significantly minority ownership of broadcast facilities." 68 FCC 2d 982. (Emphasis added).

**B. The Link Between Minority Ownership and Programming.**

6. Clearly, the Commission presumed that a minority station owner would be more responsive to the needs of its minority audience, in essence that there is a link between ownership of stations by members of minority groups and the stations' programming practices. As the Court of Appeals for District of Columbia stated in TV 9 Inc. v. F.C.C., 495 F.2d 929 (D.C. Cir. 1973).

The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proved to be significantly influential with respect to editorial comment and the presentation of news.

Diversity of control, through expanded minority ownership, was expected to increase the diversity of program content.

7. The Commission's prediction, indeed, was valid. In Metro Broadcasting, Inc. v. F.C.C., 110 S.Ct. 2997 (1990), the Court found "a host of empirical evidence" supporting the judgment that there is, in fact, a link between the ownership of stations by members of minority groups and the stations' responsiveness to minority issues. In Metro Broadcasting, the Court explained that evidence suggests that an owner's minority status influences the

selection of topics for news coverage and the presentation of editorial viewpoint. 110 S.Ct. 3017.

8. The Court in Metro Broadcasting also considered the question of whether such a prediction of a correlation between minority ownership and diversity in programming was impermissible stereotyping. It determined that the presumption that there is a link between expanded minority ownership and media diversity does not rest on impermissible stereotyping. It is, instead, permissible predictive judgment about the overall result of increased minority participation in the provision of mass media services. 110 S.Ct. 3016-3017.

**C. The Preferences Have Not Worked.**

9. The minority population in the United States has remained relatively constant since 1978, when the Commission first considered awarding preferences to encourage minority ownership in the mass media, at 20%.<sup>1</sup> In 1978, one percent of broadcast stations was minority controlled. Although AM/FM/TV station totals have risen to 12,851, a fifty percent increase,<sup>2</sup> the Minority Telecommunications Development Program ("MTDP") of the National Telecommunications and Information Administration ("NTIA"), reports in its Compilation By State of Minority-Owned Commercial Broadcasts Stations, that in 1992, 2.8% of mass media facilities were minority

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<sup>1</sup> Section 309(i)(3)(C)(ii) of the Communications Act, as amended, defines minority group to include Blacks, Hispanics, American Indians, Alaska natives, Asians and Pacific Islanders. See 47 U.S.C. Sec. 309(i)(3)(C)(ii).

<sup>2</sup> See FCC's Broadcast Station Totals as of January 31, 1993, released February 11, 1993.

controlled,<sup>3</sup> down from 2.9% in 1990 and 1991. In the 1991-1992 period, minority ownership increased by 26 stations, but decreased by 21 through sale, transfer or business failure. This is abysmal.

10. Despite the Commission's minority policies, minority ownership of mass media facilities has increased a paltry 1.8%, in the fifteen years since the 1978 Policy Statement. This slight increase in minority control demonstrates that the Commission's minority preferences, like its earlier attempts to increase diversity, have not reliably increased minority ownership of mass media facilities and diversity of voices in the marketplace. There must be a better way.

### **III. A Set Aside of LMDS Spectrum Will Achieve the Diversity Goal.**

#### **A. The Commission has the Authority to Set Aside.**

11. The Commission has proposed to license LMDS systems in two blocks of 1000 MHz each. See NPRM at 8. This two block licensing system is identical to the two block licensing system set forth in the cellular licensing scheme.<sup>4</sup> In the cellular licensing system, the Commission allocated one block of frequencies for wireline carriers and another for non-wireline carriers. The

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<sup>3</sup> As the Court in Metro Broadcasting noted, "these statistics fail to reflect the fact that, as late entrants who often have been able to obtain only the less valuable stations many minority broadcasters serve geographically limited markets with relatively small audiences." (Footnote omitted.) 110 S.Ct. 3003.

<sup>4</sup> See An Inquiry into the Use of the Bands 825-845 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, 86 FCC 2d 469, 49 Rad. Reg. 2d (P&F) 809, 818 (1981).

separate allocation was limited to a five-year duration, after which any party could apply for either block of frequencies. The Commission supported this "set aside" as the most practical way to make cellular service available to the public in a substantial number of the most populated and congested cities across the nation within three to five years. The Commission further based its decision on several important considerations. First, it noted that there was a pressing need for cellular service to relieve the severe congestion existing on conventional two-way mobile systems around the country. It also noted the wireline carriers' distinctive technical capabilities, and presence in most markets, which it reasoned would expedite cellular service to the public. The Commission considered the wireline providers' technical expertise, the need for service, the avoidance of delay occasioned by comparative hearing, and the safeguards it would put in place to avoid anticompetitive practices, and set aside one block of frequencies per market for wireline competitors.

12. The Commission must now decide, as it did in the cellular licensing proceeding, whether there is substantial justification for placing restrictions on who is eligible to become a licensee for each of the blocks of LMDS frequencies, whether realizing its long floundering goal of ethnic diversity in mass media services, a goal endorsed by all three branches of the federal government is substantial justification. It must determine that realizing ethnic diversity in the mass media marketplace is at least as compelling as the factors which justified the cellular set aside. It must

create a set aside of one block of LMDS frequencies per service area for minority applicants only.

**B. A Set Aside for Minority Licensees is Justified.**

12. The Commission has the authority to set aside frequency blocks for distinctly qualified applicants if it can justify such an action. Clearly, a set aside of one block of LMDS frequencies per service area is justified to increase diversity in the marketplace, (1) given the recognition, in the 1978 Policy Statement, of the need for minority ownership in the mass media services, (2) in light of the Supreme Court's recognition of the validity of the presumed link between minority control and station programming practices, (3) and Congress' endorsement of its continuing efforts to promote diversity in the marketplace, and (4) considering the lack of significant improvement in minority control of the mass media services, and (5) the Commission's stated desire to make as many innovative, competitive services available to the public as quickly as possible. This set aside will most reliably lead to realization of the goal set forth in 1978, minority ownership of LMDS facilities, and a concomitant increase in minority control of mass media outlets and diversity of voices in the marketplace.

**C. There are Sufficient Competing Technologies and Available Spectrum to Justify a Set Aside.**

14. Competition in the current home video marketplace is of particular importance to justification of the requested set aside. Current technologies offering the delivery of video programming to the home include conventional cable, conventional multichannel

multipoint distribution service ("MMDS"), home satellite earth stations, video cassettes, conventional broadcasting (both network and independent), video dialtone services and the soon to be introduced direct to home satellite service (DirecTV). Plus, there are two allocations at 286 Hz, intended to provide video transmission to the home. Clearly, there is more than sufficient diversity in the technology marketplace to support the concept of a set aside at 28 GHz. Considering the competing technologies, implementing the minority set aside will result in no harmful prejudice to non-minorities.

15. Currently, there is no significant minority penetration into the above referenced competitive services. The minority penetration in broadcasting, discussed infra, is the best documented and most deeply penetrated of all the video to home delivery services. In MMDS, the Commission implemented a minority preference in awarding authorizations by lottery. But out of 15 major wireless cable operators surveyed, only one, Transworld Telecommunications, Inc. ("TTI"), is minority controlled or operated or has any significant minority ownership. Clearly the lottery preferences awarded in the MMDS lotteries did not achieve the desired result of increasing minority ownership.

16. In the cable marketplace, there is a move afoot to increase the horizontal and vertical integration of large multiple system owners ("MSO"). These are overwhelmingly non-minority owners who are currently arguing before the Commission, in Rulemaking MM 92-264, that the current 25-35% limit on MSO

ownership of cable systems is too low. The Cable groups argue that further vertical integration of these large MSOs into the tightly knit cable marketplace would yield significant, although undefined, benefits. One outcome to be expected of such an action is clear: minority ownership would be edged further out of the home video delivery market in favor of these large non-minority MSOs. That is the simple harsh reality of the marketplace. But fortunately, it is an unseemly reality that can be addressed and brought into check in the 28 GHz arena. Adoption of the proposals set forth herein will bring into balance the egregious exclusion of minority proprietors from the ever expanding family of industries that deliver video and other programming directly to the home.

**D.    The Supreme Court has Determined that FCC Policies Encouraging Minority Ownership Do Not Violate the Equal Protection Clause of the Constitution.**

17. In Metro Broadcasting, the Supreme Court noted that the FCC's minority ownership programs have been specifically approved - - indeed, mandated -- by Congress. In the face of the Congressional mandate, the Court is "bound to approach [the task of review] with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to provide for the ... general Welfare of the United States and to enforce by appropriate legislation, the equal protection guarantees of the Fourteenth Amendment. 110 S.Ct. 3008, quoting Fullilove v. Klutznick, 448 U.S. 448 (1980). Moreover, in Metro Broadcasting, the Court noted that its decision in Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), concerning a minority set-aside program

adopted by a municipality, served to bolster the concept in Fullilove, "that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments." 110 S.Ct. 3009.

18. The Court in Metro Broadcasting, then discussed the rationale for the Commission's minority ownership policies. It stated that Congress found, in H.R. Conf. Rep. No. 97-765 (1982), that the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications. It went on to note that Congress and the Commission do not justify the minority ownership policies strictly as remedies for victims of this discrimination, rather, Congress and the FCC have selected minority ownership policies primarily to promote programming diversity, itself an important governmental objective that can serve as a constitutional basis for the minority ownership policies. In Radio Jonesboro, Inc., 100 FCC 2d 941 (1985), the Commission succinctly stated its rationale for the minority ownership policies,

"...credit for minority ownership and participation is awarded in a comparative proceeding [because] minority ownership is likely to increase diversity of content, especially of opinion and viewpoint." 100 FCC 2d 945.

19. In 1978, Congress considered a broadcast lottery scheme which would accord preferences to minority applicants. At that time, the Executive Branch objected to the lottery proposal on the ground that it would harm minorities by eliminating the credit granted under the comparative hearing scheme, in place at the FCC.



Although the lottery scheme was eventually enacted, it includes clear language requiring that in any random selection lottery conducted by the FCC, a preference is to be granted to every applicant whose receipt of a license would increase the diversification of mass media ownership and that "[t]o further diversify the ownership of the media of mass communications, an additional significant preference [is to be given] to any applicant controlled by a member or members of a minority group." See 47 U.S.C. Section 309(i)(3)(A); see also 110 S.Ct. 3015. As recently as 1986, a House subcommittee held a hearing to examine the Commission's inquiry into the validity of its minority ownership policies. The subcommittee chair expressed his view that "[t]he most important message of this hearing today, is that the Commission must not dismantle these longstanding diversity policies, which Congress has repeatedly endorsed, until such time as Congress or the courts direct otherwise." See Minority Owned Broadcast Stations: Hearing on H.R. 5373, before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 99th Cong., 2d Sess., 13 (1986)(Rep. Wirth). Ultimately, Congress chose to employ its appropriations power to keep the FCC's minority ownership policies in place for fiscal year 1988. It has twice extended that prohibition on use of appropriated funds to modify or repeal minority ownership policies in fiscal years 1989, 1990.

IV. The LMDS Rulemaking is the vehicle for the FCC to Set Aside a Block of Frequencies to Foster Ethnic and Cultural Diversity with Appropriate Guidelines to Protect Against Abuses.

20. In the 1978 Policy Statement, the Commission recognized that the minority preference, and other policies announced therein were "first steps" and did not approach a "total solution" to the acute minority underrepresentation problem. Considering the abject failure of the Commission's minority ownership policies to foster a significant increase in minority ownership in fifteen years, clearly, it is time for the next step toward a total solution to the minority underrepresentation problem. The proposed set aside is that next logical step in effecting a "total solution" to the problems identified so long ago.

21. Such a set aside can and should be created with provisions to avoid trafficking, and sham applicant structures which subvert the intention of Commission policies. The Commission is all too familiar with bogus application proposals tailored to exploit the policies adopted to encourage minority ownership of broadcast facilities. Yes, there are dangers associated with regulations designed to open the door to minority applicants. But, the Commission is now armed with decades of experience with the bag of tricks employed by insincere applicants. It can use that experience to design rules and policies that guard against the dangers. It can avoid historic abuses by instituting appropriate measures, which are now apparent, such as minimum equity positions for minority participants; construction requirements; and operation requirements.

22. A requirement that an LMDS authorization be constructed within one year of grant of a construction permit and that the initial licensee operate the system for at least two years before assignment would avoid the parade of trafficking horrors which often accompanies minority preferences. A lengthy holding period following construction would discourage non-minority speculators from designing sham applications because their capital would be tied up in the system for too long to be appealing. The kinds of protections will help ensure against abuse of a setaside policy.

**V. CONCLUSION.**

22. In the 1978 Policy Statement, the Commission identified a critical deficiency in minority ownership which affected the quality of diversity in the mass media marketplace. It implemented policies by which it proposed to cure that deficiency. In fifteen years, minority ownership has increased a paltry 1.8 percent. Clearly, the minority ownership policies have not been successful.

23. The NAACP proposes a better way to ensure the Commission's stated objective: increased minority ownership of mass media facilities. The set aside proposed herein is not violative of the Equal Protection provisions of the U.S. Constitution. Considering the multiplicity of home video delivery media, it will not compromise competition. In light of the MSO's push for more turf, it will in fact counterbalance the overwhelming non-minority profile of the home video delivery marketplace.

24. The Commission has recognized the dearth of minority ownership in the mass media services. It now has an opportunity to cure that deficiency in a manner which focuses like a laser beam on diversity and accomplishes the statutorily mandated goal with absolute precision. The Commission may be reluctant to adopt a set aside because of past abuse of such minority oriented policies. But the Commission cannot allow such past negative experiences to punish the bona fide minority companies that now come before it to ask only for a chance to compete. The Commission can channel its past experience into the creation of a procedure that works. The NAACP urges the Commission to seize this opportunity and set aside one block of LMDS frequencies per service area for minority applicants only.

The foregoing considered, the NAACP respectfully requests that the Commission set aside one block of LMDS frequencies per service area for minority applicants only.

Respectfully submitted,

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